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Supreme Court, U.S.
FILED

No. 08-0044 08-320 SEP 4 - 2008

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IN THE
SUPREME COURT OF THE UNITED STATES
OF AMERICA

LEROY HAYES, JR – PETITIONER

vs.

WELLS FARGO BANK – RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

THE SUPREME COURT OF TEXAS

PETITION FOR WRIT OF CERTIORARI

LEROY HAYES, JR.
8320 GULF FRWY, #212
HOUSTON, TEXAS 77017
(713) 643 - 1864

QUESTIONS:

1. What is the U. S. Supreme Court's view on a Dual Contract with wording confusing to even the local state Supreme Court?

2. What is the U. S. Supreme Court's view on a lender's duty in advising its customers as to the structure of a loan transaction?

3. What is the U. S. Supreme Court's view on "What is a balloon loan vs. a fully amortized loan?"

4. What is the U. S. Supreme Court's stance on patterns developed in loans given by lenders/loan officers and the red flags outside those patterns?

5. Would the U. S. Supreme Court having seen 83%+ fully amortized loans to one customer, throw a red flag after 6 loans – when the sixth loan is a balloon note on the same contract paper?

6. Would the U. S. Supreme Court throw the Red Flag if a rookie loan officer did the calculation on a $100,000 loan for the first time in less than 3 months on the job?

7. What is the U. S. Supreme Court's stance on the credibility of a party (or parties) when the party's testimony is inconsistent?

8. When is a Judge's discretion on allowing inconsistent testimonies too much for the Supreme Court of the United States?

QUESTIONS, CONTINUED:

9. Will the Supreme Court of the United States define impartiality?

10. When full disclosure of evidence is not adhered to, when should the mistrial be granted?

11. Would the U. S. Supreme Court define full disclosure as it pertains to a Federal Bank loan contract?

12. Does the Supreme Court condone withholding key information when it comes to a customer borrowing money of any amount from a Federal Bank?

13. When paying for a jury trial, why should the judge be able to deny it when the Constitution makes it a right for everyone?

14. Would you as a parent throw up a red flag made 17% on an exam in school when he/she was always making 83%+ on previous exams?

15. Finally, what is the U. S. Supreme Court's "Red Flag" clues for fraudulent and deceptive acts on a Dual Contract?

QUESTIONS AUTHORITIES:
The numbers correspond directly to the numbered questions.

1. Dual Contract: Wells Fargo's own contract and material needed at signing for the borrower.

2. Lender Duty to Borrower: Robinson v. Poudre Valley Fed. Credit Union, 654 P. 2d861 (Colo. App. 1983).

3. Texas Laws on Balloon Note authority & the Regulation Z authority on fully amortized loans.

4. Patterns authorities: Modus Operandi Approach.

5. Patterns authorities: Modus Operandi Approach.

6. Source: Court Reporter's Records and the pages of testimony (Vol. 2, RR, p. 16, L16 -19, p. 17, L1-7).

7. Sources for inconsistent testimony: Missouri PAC. Ry. v. Somers, 14S. W. 799, 780 (Tex. 189); cf., International & Great N. Ry. v. Mills, 78S. W. 11, 13 (TEX. APP. 1903).

8. Marshall V. Jerrico, Inc., 446 U.S. 238,242 (1980) (party entitled to impartial and disinterested tribunal in Civil and Criminal Cases.

9. Marshall V. Jerrico, Inc., 446 U.S. 238,242 (1980) (party entitled to impartial and disinterested tribunal in Civil and Criminal Cases.

10. See Appendix M and the United States Constitutional Law on Full Disclosure of Evidence.

11. See Appendix H.

12. Lender Duty to Borrower: Robinson v. Poudre Valley Fed. Credit Union, 654 P. 2d861 (Colo. App. 1983).

13. See Appendix L and The United States Constitution: 6th Amendment: Right to a Trial by Jury.

14. Patterns authorities: Modus Operandi Approach and Texas Uniform Commerce Code: General Provision (Deceptive and Fraudulent Acts).

15. Question to be answered by the U.S. Supreme Court.

LIST OF PARTIES

[ ] All parties appear in the caption of the case on the cover page.

[x] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding I the court whose judgment is the subject of this petition is as follows:

Wells Fargo Employees:
JOHN SCROGGINS, BRANCH PRESIDENT
SUSAN HOLCOMB, LOAN OFFICER

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1. Interfirst Bank Dallas, N.A.V. Risser, 739S.W.2d 882 (Tex. Ap. – Texarkana 1987) and the Texas Bank Lawyer, April 1988, Vol. 11, No. 11. Trustee's Breached by bad faith and self-dealing.....Pages 3 – 4.

2. Marshall V. Jerrico, Inc., 446 U.S. 238,242 (1980) (party entitled to impartial and disinterested tribunal in Civil and Criminal Cases)....Pages 36 – 39.

3. Missouri Pac. Ry.V. Somers, 14S.W.799,780(Tex. 189); cf. International and Great N.Ry.V.Mills, 78S.W.11,13(Tex. App. 1903). The Supreme Court has permitted the credibility of a party to be questioned on appeal when the party's testimony is inconsistent.....Pages 3 – 4, 27 – 28.

4. Robinson v. Poudre Valley Fed. Credit Union, 654 P. 2d 861 (Colo. App. 1983).....Pages 3 – 4, 27 – 28.

5. Texas Uniform Commerce Code: General Provision.....Pages 3 – 4, 27 – 28.

6. "The relationship between a Client/Customer and an investment adviser/loan officer is very much built on trust.." Source: Texas Bank Lawyer, June 1983, Vol. 7, No. 1 & April 1988 Vol. 11, No. 11.....Pages 3 – 4, 27 – 28.

7. The U.S. Supreme Court.....Pages 3 – 4, 27 – 28.

8. The United States Constitution: 6th Amendment: Right to a Trial by Jury.....Page 35.

9. U.S. Constitution, Article XIV, The 14th Amendment provides me with due process of law...Pages 36 – 39.

OPINIONS BELOW

The Texas Supreme Court received from the Petitioner requesting for an extension on Petition for Review was received 1/16/08 and is located in Appendix A.

On 4/21/08, Petitioner's Motion for Rehearing was received by the Texas Supreme Court and is located in Appendix B.

On 6/6/08, The Supreme Court of Texas denied the Motion for Rehearing on case #08-0044 and is located in Appendix C.

In the Court of Appeals for the First District of Texas, the opinion was issued October 18, 2007, case #01-06-00720-CV and is located in Appendix D.

In the District Court, 280th District of Harris County, Final Judgment of Cause #2005-43586 was rendered May 9, 2006 and is located in Appendix E.

JURISDICTION

On 6/6/08, The Supreme Court of Texas denied the Motion for Rehearing on case #08-0044 and is located in Appendix C. The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The United States Constitution: 14th Amendment.

2. The United States Constitution: 6th Amendment.

3. The Truth in Lending Statues: Regulation Z.

4. Texas Uniform Commerce Code: General Provision (Deceptive & Fraudulent Act).

5. The Texas Promissory Installment Note (with Balloon Payment) Provisions.

STATEMENT OF THE CASE

NATURE OF THE CASE: This is a case where the Petitioner (Leroy Hayes, Jr.) took out a loan for $100,000.00 with Prime Bank (account number 1021000311), when merged with Wells Fargo Bank the account became 3646478738-18) at a 9% interest rate over 60 months in February 2000; had this loan been fully amortized over that 60 months, the pay back to the bank would have been $124,560.00—(See Appendix G - Amortization Table/Schedule). The Petitioner is seeking to pay that amount only.

Petitioner went to Prime Bank/Wells Fargo Bank in August 2004 to advise the loan officers of the fact that the amount of $1608.91 would not pay off this loan by February 11, 2005; the monthly amount should have been $2076.00. The loan officer's way of calculating monthly payment would result in Petitioner paying $141,000 plus back to the bank.

REASONS FOR GRANTING THE PETITION

A commitment to the truth and accepting factual evidence in this case will lead the honorable justices to justice being served in this fraudulent civil case against Wells Fargo Bank and its named employees. A Federally Insured and Regulated Bank by the U.S. Federal Government should be held to the highest standards.

> **"Fighting Fraud From the Top Down according to AARP speaking with Attorney General Greg Abbott, now in his second term, about financial security and frauds commonly perpetrated against older Texans. His office works to track and prosecute scams large and small. In recent months, the Office of the Attorney General has warned Texas residents about identity theft scams that play off people's trust in established institutions like banks, credit unions and charities."**

The pattern of loans obtained from this bank in question by this Petitioner established trust as demonstrated by 6 straight amortized loans followed by the 1 balloon note. This would result in more money being paid to the bank; inconsistent with established patterns. Thus, another reason for granting petition.

CONCLUSION

After reviewing the patterns of the previous loans that were obtained by this Petitioner on the same contract paper, from the same loan officers and bank, 83% of the loans were amortized, with equal monthly payments for the life of the loan and 17% of the loans were a balloon note.

John Scroggins testified that he did not do the loan and this can found in Appendix I. Susan M. Holcomb, the loan officer who actually did the loan can be found in Appendix F, bearing her name and signature on the contract. Also in Appendix I, one will find her testimony showed she was an inexperienced loan officer handling this Petitioner's account; thus making the error.

Based on these facts, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Leroy Hayes, Jr.

Date: 9/4/08

Appendix A

OFFICIAL NOTICE FROM SUPREME COURT OF TEXAS

Date: 1/16/2008

RE: Case No. 08-0044
COA #: 01-06-00720-CV
STYLE: LEROY HAYES JR.
v. WELLS FARGO BANK, N.A.

Today the Supreme Court of Texas received and filed a motion for extension of time to filed petition for review pursuant to Rule 53.7(f) in the above numbered and styled case.

MAIL TO:

MR. LEROY HAYES JR.
8320 GULF FREEWAY #212
HOUSTON, TX 77017

Appendix B

OFFICIAL NOTICE FROM SUPREME COURT OF TEXAS

Date: 4/21/2008

RE: Case No. 08-0044
COA #: 01-06-00720-CV TC#: 2005-43586
STYLE: LEROY HAYES JR.
vi. WELLS FARGO BANK, N.A.
Petitioner's motion for rehearing was this day filed in the above styled and numbered case.

MAIL TO:
MR. LEROY HAYES JR.
8320 GULF FREEWAY #212
HOUSTON, TX 77017

Appendix C

OFFICIAL NOTICE FROM SUPREME COURT OF TEXAS

Date: 6/6/2008

RE: Case No. 08-0044
COA #: 01-06-00720-CV TC#: 2005-43586
STYLE: LEROY HAYES JR.

vii. WELLS FARGO BANK, N.A.

Today the Supreme Court of Texas denied the motion for rehearing of the above-referenced petition for review. (Justice Johnson not sitting)

MAIL TO:

MR. LEROY HAYES JR.
8320 GULF FREEWAY #212
HOUSTON, TX 77017

Appendix D

In The
Court of Appeals
For The
First District of Texas

NO. 01-06-00720-CV

LEROY HAYES, JR., Appellant

V.

WELLS FARGO BANK, N.A., Appellee

On Appeal from the 280th District Court
Harris County, Texas
Trial Court Cause No. 2005-43586

MEMORANDUM OPINION

Appellant, Leroy Hayes, Jr., pro se, appeals a take-nothing judgment rendered in favor of appellee, Wells Fargo Bank, N.A. (the bank) after a bench trial. The judgment awarded the amount of principal and interest on a promissory note

acknowledging Hayes's indebtedness to the bank and also awarded the bank attorney's fees. We construe Hayes's issues on appeal as follows: (1) Hayes challenges (a) the trial court's interpretation of the note and (b) the sufficiency of the evidence to support the trial court's implied findings, (2) Hayes contends he was entitled to a mistrial because the bank did not respond to discovery requested during the week before trial, and (3) Hayes contends that the trial court abused its discretion by (a) denying Hayes's request for a jury trial, (b) excusing a witness that Hayes had subpoenaed, and (c) applying the rule of sequestration. We affirm.

Background

Prime Bank (later purchased by Wells Fargo) loaned $100,000 to Hayes for "working capital" for his business. On February 11, 2000, Hayes signed a "Commercial Fixed Rate Promissory Note" by which he promised to repay all principal plus interest at the rate of 9%, with total interest charges of $24,546.20. The note was payable "[o]n demand, but if no demand is made, then" in 59 payments of $1,608.91 each, with a final payment, "due and payable" on February 11, 2005 for "the unpaid balance plus accrued interest." The note recites Hayes's promise to pay "until all amounts owing under this note are paid in full." Hayes was authorized to prepay the note, in part or in full, on or before the maturity date without penalty.

Hayes's lawsuit disputes the last, or 60th payment, due on February 11, 2006. Though his live pleadings acknowledge the terms stated above, Hayes alleged (1) that his "understanding and intentions," when he executed the note, were that his loan would be paid "in full" by February 11, 2006, (2) that he did not know that the last payment due would be a "balloon payment," and (3) that he should not be required to "pay an additional . . . $14,235.52 in interest

as prescribed by the written contract."[1] Hayes sought attorney's fees, interest, and costs, but did not assert a claim for damages.

The bank filed a general denial and a counterclaim asserting that Hayes still owed $35,272.31 on the note, in addition to attorney's fees and costs. The bank also filed a motion for judgment on the day before trial began.

After a two-day trial, the trial court rendered judgment that Hayes take nothing on his claim, and that Wells Fargo was entitled to "recover on its modified counterclaim" and also entitled to interest, costs, and attorney's fees for trial and contingent attorney's fees for appeal. The trial court did not file findings of fact and conclusions of law, and Hayes did not request them. Hayes timely filed a letter requesting a new trial, which the trial court denied after an oral hearing.

Standard of Review

Because we have no findings of fact and conclusions of law by the trial court, we infer all findings necessary to support the judgment. *See BMC Software Belg., N.V. v. Marchand*, 83 S.W.3d 789, 795 (Tex. 2002); *Worford v. Stamper*, 801 S.W.2d 108, 109 (Tex. 1990). It is axiomatic that any implied finding be consistent with the judgment. *Anderson Mill Mun. Util. Dist. v. Robbins*, No. 03-04-00369-CV, 2005 WL 2170355, at *6 (Tex. App.--Austin, Sept. 8, 2005, no pet.). We presume that the trial court found all questions of fact in support of the judgment, and we affirm if the judgment can be upheld on any legal basis supported by the pleadings and the evidence. *See Point Lookout W., Inc. v. Whorton*, 742 S.W.2d 277, 278 (Tex. 1987); *Worford*, 801 S.W.2d at 109. When the record includes a reporter's record of the trial, as here, the appealing party must show that the judgment of the court below cannot be sustained by any theory raised by the evidence. *See Whorton*, 742 S.W.2d at 278.

A. Contract-Interpretation Challenges

Two of Hayes's issues challenge the trial court's interpretation of the loan documents and note. The well-settled rules of

contract interpretation apply to promissory notes. *See EMC Mortgage Corp. v. Davis*, 167 S.W.3d 406, 413 (Tex. App.--Austin 2005, pet. ref'd). The court's first priority is to determine the intent of the parties as expressed in the instrument. *DeWitt County Elec. Coop., Inc. v. Parks*, 1 S.W.3d 96, 100 (Tex. 1999); *EMC Mortgage Corp.*, 167 S.W.3d at 413 (citing *J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223, 229 (Tex. 2003); *Nat'l Union Fire Ins. Co. v. CBI Indus.*, 907 S.W.2d 517, 520 (Tex. 1995)). In determining the parties' intent, courts must consider the entire writing and give effect to all provisions of the contract within the context of the entire agreement so that no provision is either rendered meaningless or given dispositive effect in isolation. *See Coker v. Coker*, 650 S.W.2d 391, 393 (Tex. 1983); *EMC Mortgage Corp.*, 167 S.W.3d at 413. If this analysis permits a certain or definite legal meaning or interpretation, then there is no ambiguity, and the court will construe the contract as a matter of law. *Lopez v. Munoz, Hockema & Reed, L.L.P.*, 22 S.W.3d 857, 861 (Tex. 2000); *Coker*, 650 S.W.2d at 393; *EMC Mortgage Corp.*, 167 S.W.3d at 413. A contract is ambiguous only when it is reasonably susceptible to more than one meaning. *Am. Mfrs. Mut. Ins. Co. v. Schaefer*, 124 S.W.3d 154, 157 (Tex. 2003). Whether a contract is ambiguous is a question of law for the court. *Coker*, 650 S.W.2d at 393; *EMC Mortgage Corp.*, 167 S.W.3d at 413. Extraneous evidence concerning the parties' interpretations is admissible only if the court first determines that the contract is ambiguous. *National Union*, 907 S.W.2d at 520; *EMC Mortgage Corp.*, 167 S.W.3d at 413.

In this case, the trial court's judgment recites that Hayes "have and recover nothing" from the bank on his claims. This judgment implies that the trial court rejected Hayes's claims (1) that he expected and intended, in executing the note, that his loan would be paid "in full" by February 11, 2005 after paying $1,608.91 per month, (2) that he did not know that the last payment due would be "balloon payment," and (3) that he should not be required to "pay an additional . . . $14,235.52 in interest as prescribed by the written contract."

The face of the note defeats Hayes's first contention because paying $1,608.91 for 60 months would repay only $96,534.60 against an undisputed $100,000 indebtedness. By rendering judgment against Hayes, the trial court impliedly rejected this claim and Hayes's remaining claims. An agreement with a balloon-payment provision generally calls for regular, equal payments that consist mostly of interest and smaller amounts of principal, with a large, final payment of all remaining principal plus any accrued interest, which fully satisfies the borrower's financial obligations to the lender. *See EMC Mortgage Corp.*, 167 S.W.3d at 414 (citing *Parker v. Dodge*, 98 S.W.3d 297, 299 (Tex. App.--Houston [1st Dist.] 2003, no pet.); *Katy Pers. Storage v. First State Bank*, 968 S.W.2d 579, 580 (Tex. App.--Houston [14th Dist.] 1998, pet. withdrawn)). Because the note and accompanying documents in this case meet these criteria, the trial court properly concluded, as a matter of law, that the note unequivocally required a 60th, balloon payment of unpaid principal plus interest. The trial court's stating on the record that the bank did not "adequately impress" upon Hayes the nature of the balloon payment neither changes this result nor compels a different interpretation of the note.

The record here shows that Hayes realized, from his own calculations, that a balloon payment was due and complained to the bank. In response to Hayes's complaints, the bank loaned him additional funds at a lower interest rate to enable him to pay off his balance. As the trial court recognized, Hayes was "absolutely" not adversely affected even if he did not initially understand that he had signed a loan committing him to a balloon payment.

Hayes counters that the bank violated the disclosure requirements of 12 C.F.R. Part 226 (Regulation Z), adopted under the Federal Truth in Lending Act, 15 U.S.C. § 1601 et seq., because the bank did not disclose that the loan transaction required a balloon payment. As reflected in the enactment of chapter 348 of the Finance Code, which governs installment sales of motor vehicles, Regulation Z applies to "*retail* installment transactions." *See* Tex. Fin. Code Ann. § 348.009(a)

(Vernon 2006) (emphasis added); *see also* 12 C.F.R. Part 226.1(b) (stating that Regulation Z serves to "promote informed use of *consumer* credit" by requiring full disclosure of terms and costs) (emphasis added). Hayes's note shows on its face that it is a commercial, fixed rate promissory note. It is undisputed that Hayes borrowed the $100,000 as working capital for his business and thus for a commercial, rather than a retail, purpose. As the trial court recognized, Regulation Z does not apply to this commercial transaction. *See* Tex. Fin. Code Ann. § 348.009(a); 12 C.F.R. Part 226.1.

Hayes also argues that a bank officer made a "human error" in calculating amortization of Hayes's $100,000 loan because his monthly payments should have amounted to $2,076.00, instead of $1,608.91 monthly, in order to amortize the $100,000 indebtedness over 60 months. But, Hayes's proposed amortization would change the basic character of his note from a loan transaction that requires a final balloon payment "of the unpaid principal balance plus accrued interest," to a loan transaction with equal monthly payments of both principal and interest and a final payment equal to all preceding monthly payments. Hayes's recalculation would require that the balloon payment terms of his note be disregarded as meaningless and thus contravene the settled rule of interpretation, that all terms of the note must be construed together, with none rendered meaningless. *See Coker*, 650 S.W.2d at 393. Hayes's proposed amortization would also render the terms of the note ambiguous--by requiring a final balloon payment while negating any final balloon payment. *See EMC Mortgage Corp.*, 176 S.W.3d at 414 (holding that note requiring both a final balloon payment and equal monthly payments of principal and interest was internally inconsistent and therefore ambiguous).

Hayes's last challenge to the loan is premised on claims that the trial court erred in applying the parol evidence rule. This is a rule of substantive law. *Hubacek v. Ennis State Bank*, 317 S.W.2d 30, 32 (Tex. 1958); *Gonzalez v. United Bhd. of Carpenters & Joiners*, 93 S.W.3d 208, 211 (Tex. App.--Houston [14th Dist.] 2002, no pet.) When parties reduce an

agreement to writing, the law of parol evidence presumes, in the absence of fraud, accident, or mistake, that prior or contemporaneous agreements, whether oral or written, are merged into the final, written agreement and, therefore, that any provisions not set out in the writing were either abandoned before execution of the agreement or, alternatively, were never made and are thus excluded from consideration in interpreting the written agreement. *See Hubacek*, 317 S.W.2d at 32; *Smith v. Smith*, 794 S.W.2d 823, 827 (Tex. App.--Dallas 1990, no writ); *Muhm v. Davies*, 580 S.W.2d 98, 101 (Tex. Civ. App.--Houston [1st Dist.] 1979, writ ref'd n.r.e.).

Hayes argues that application of the parol evidence rule favors him. He contends that the balloon payment is not disclosed in the note and, therefore, no balloon payment is required, because "proper application" of the parol evidence rule precludes any testimony by the bank's witnesses concerning oral statements regarding a balloon payment. As addressed above, the trial court could properly have concluded as a matter of law and from the face of the note alone, that the loan transaction required a balloon payment. Hayes has not demonstrated with citations to the record that the trial court improperly considered parol evidence, and nothing in the record supports his contention.

We overrule Hayes's issues (a), (b), and (c).

B. Challenges to the Factual Sufficiency of the Evidence

Hayes's issue (f) challenges the sufficiency of the evidence to support the take-nothing judgment. A request for findings of fact and conclusions of law is not required to question the sufficiency of the evidence. *Pruet v. Coastal States Trading, Inc.*, 715 S.W.2d 702, 704 (Tex. App.--Houston [1st Dist.] 1986, no writ). Accordingly, Hayes may challenge the trial court's implied findings for legal and factual sufficiency, under the same standards that govern challenges to a jury's findings. *See BMC Software*, 83 S.W.3d at 795. Hayes does not argue that he proved his claims as a matter of law or that no evidence supports the judgment in favor of the bank, but contends that

the trial court improperly resolved in the bank's favor what Hayes contends are lies and inconsistencies by the bank's witnesses. Accordingly, we construe his arguments as contending that the great weight and preponderance of the evidence to support the trial court's implied findings in favor of the bank and thus, as asserting a challenge to the factual sufficiency of the evidence.

In assessing a factual sufficiency challenge, we weigh all the evidence, both supporting and conflicting, and may set the finding aside only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and manifestly unjust. *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986); *In re King's Estate*, 244 S.W.2d 660, 661 (Tex. 1951); *Comm'n of Contracts v. Arriba Ltd.*, 882 S.W.2d 576, 582 (Tex. App.--Houston [1st Dist.] 1994, no writ). In an appeal from a bench trial, we may not invade the fact-finding role of the trial court, who is the sole judge of the credibility of the witnesses and the weight to give their testimony, and alone determines whether to accept or reject all or any part of that testimony. *Nordstrom v. Nordstrom*, 965 S.W.2d 575, 580-81 (Tex. App.--Houston [1st Dist.] 1997, pet. denied).

Hayes's basic premise appears to be that the bank mistakenly loaned him the $100,000 through a balloon-note transaction instead of a traditional transaction. He points to testimony by a "rookie" loan officer who (1) denied that she made the loan, but whose initials are "all over the contract agreements" and (2) claimed she discussed the balloon loan with Hayes. Hayes also points to testimony by the bank president who (1) stated he did Hayes's loan and discussed the balloon payment with Hayes; (2) "lied" about whether the loan was a ten-year loan or a seven-year loan; and (3) denied performing amortizations "personally," but later stated that he used his calculator to perform the calculations.[(2)]

We decline to invade the trial court's credibility determinations or the weight, if any, that the trial court chose to give testimony by the bank's witnesses. *See id.* Having nonetheless reviewed

all the evidence from the trial in accordance with Hayes's challenge, we cannot say that the evidence so greatly preponderates against the implied findings by the trial court in favor of the bank that the judgment in favor of the bank is clearly wrong and manifestly unjust. *See Cain*, 709 S.W.2d at 176; *In re King's Estate*, 244 S.W.2d at 661.

We overrule Hayes's issue (f).

Claimed Discovery Error

In issue (d), Hayes contends that he was entitled to a mistrial because the bank did not disclose its witnesses or material evidence to him in response to his request. It is undisputed that Hayes did not request discovery of the bank until less than a week before the May 8, 2000 trial. Requests for disclosure must be made "no later than 30 days before the end of any applicable discovery period." Tex. R. Civ. P. 194.1; *accord* Tex. R. Civ. P. 194.3 (stating that party responding to discovery request generally has 30 days to serve a written response on the requesting party). Aggrieved parties in a discovery dispute must obtain a ruling before trial begins in order to preserve error. *Remington Arms Co. v. Caldwell*, 850 S.W.2d 167, 170 (Tex. 1993). Having failed to obtain a ruling on his discovery request before trial, Hayes waived any error. *See* Tex. R. App. P. 33.1.

We overrule Hayes's issue (d).

Claimed Errors in Conducting Trial

In issues (e) and (g), Hayes contends that the trial court erred by (1) denying his request for a jury trial, (2) not allowing him to question all the witnesses he had subpoenaed, and (3) not instructing the witnesses "not to discuss the case among themselves." Rulings related to conducting the trial are within the trial court's broad discretion and will not be set aside on appeal unless the trial court manifestly abused its discretion. *Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 239 (Tex. 2001). A trial court abuses its discretion when it reaches a decision that is so arbitrary and unreasonable that it amounts to a clear and

prejudicial error of law, or when it clearly fails to correctly analyze or apply the law. *In re Ford Motor Co.*, 165 S.W.3d 315, 317 (Tex. 2005) (citing *Walker v. Packer*, 827 S.W.2d 833, 839-40 (Tex. 1992)). Because a trial court has no discretion in determining what the law is, which law governs, or how to apply the law, we review these types of discretionary rulings de novo. *See In re D. Wilson Constr. Co.*, 196 S.W.3d 774, 781 (Tex. 2006) (citing *Walker*, 827 S.W.2d at 840). But when we review a ruling that results from the trial court's having resolved underlying facts, we must defer to the trial court's factual resolutions, and any credibility determinations that may have affected those resolutions, and we may not substitute our judgment for the trial court's judgment in those matters. *See Walker*, 827 S.W.2d at 839-40; *Holley v. Holley*, 864 S.W.2d 703, 706 (Tex. App.--Houston [1st Dist.] 1993, writ denied).

A. Denial of Jury Trial

Hayes contends that the trial court erred by denying his request for a jury trial. Though the Texas Constitution guarantees a right to trial by jury, Tex. Const. art. I, § 15, the Constitution further provides that "[N]o jury shall be empaneled in any civil case unless demanded by a party to the case, and a jury fee be paid by the party demanding a jury, for such sum, and with such exceptions as may be prescribed by the Legislature." Tex. Const. art. V, § 10. We review denial of a demand for a jury trial for abuse of discretion. *Monroe v. Alternatives in Motion*, No. 01-05-01187-CV, 01-05-01188-CV, 2007 WL 529295, at *10 (Tex. App.--Houston [1st Dist.] Feb. 22, 2007, no pet. h.) (citing *Mercedes-Benz Credit Corp. v. Rhyne*, 925 S.W.2d 664, 666 (Tex. 1996)).

A party who seeks a jury trial must request a jury and pay the jury fee at "a reasonable time before the date set for trial of the cause on the non-jury docket, but not less than thirty days in advance." Tex. R. Civ. P. 216. A trial court does not abuse its discretion by denying a trial by jury when there is no timely request or payment of a jury fee. *Huddle v. Huddle*, 696 S.W.2d 895, 895 (Tex. 1985); *Martin v. Black*, 909 S.W.2d 192, 197

(Tex. App.--Houston [14th Dist.] 1995, writ denied). An untimely jury demand should be granted, however, if granting the request will not (1) interfere with the court's docket, (2) delay the trial, or (3) injure the opposing party. *See Gen. Motors Corp. v. Gayle*, 951 S.W.2d 469, 476 (Tex. 1997); *Barkhausen v. Craycom, Inc.*, 178 S.W.3d 413, 418 (Tex. App.--Houston [1st Dist.] 2005, pet. denied).

Hayes stated on the record in this case that he believed he requested a jury trial and paid the jury fee when he filed suit, but he could not produce a receipt showing that he had paid the jury fee. Counsel for the bank stated that he never received a written request for jury trial. After learning from the court coordinator that no jury fee had been paid, Hayes paid the fee on the Friday before the Monday that trial began.

When the trial court ruled that no jury would be empaneled because Hayes did not timely pay the fee, Hayes did not attempt to demonstrate that granting the request for jury trial would not interfere with the court's docket, delay the trial, or injure the opposing party. The trial court, however, specified that, "it would certainly interrupt the Court's docket to try and put this case now on a jury docket." Accordingly, we hold that the trial court did not abuse its discretion by denying Hayes's request for a jury trial. *See Gen. Motors Corp.*, 951 S.W.2d at 476; *Barkhausen*, 178 S.W.3d at 418.

We overrule the portion of Hayes's issue (e) that challenges denial of a jury trial.

. Questioning Subpoenaed Witnesses

In another portion of issue (e), Hayes contends that the trial court erred by not permitting Hayes to question all the witnesses he had subpoenaed. We construe this complaint as contending that the trial court erred by not permitting one of Hayes's two subpoenaed witnesses to testify. Admission or exclusion of evidence is generally a matter within the trial court's discretion. *In re J.P.B.*, 180 S.W.3d 570, 575 (Tex.

2005) (citing *State v. Bristol Hotel Asset Co.*, 65 S.W.3d 638, 647 (Tex. 2001)). The record of this case establishes that Hayes personally excused the witness and thus has no complaint. The following transpired at the end of the first day of trial:

THE COURT: Now, sometime back you told me that you were getting your financial advice from other people and I don't remember if these are the two people or not, but I explained to you that the Court doesn't take lay witnesses to [tell] me what the law is. It would appear to me that more than likely you have these two witnesses on the hook here under subpoena because you want them to tell me what they think the law is or maybe what they told you the law is or something like that. If you want to ask them any questions like that, they will not be allowed to answer. *Are you sure you want these two witnesses back in the morning?*

HAYES: I would like to have Mr. Eugene Williams back on tomorrow morning. *Mr. Barrick, I can excuse him.*

(Emphasis added)]

Because it is apparent that Hayes chose to abandon his request to have Barrick testify, we hold that Hayes waived his complaint.

We overrule the remaining portion of Hayes's issue (e).

C. Invoking "The Rule"

In issue (g), Hayes argues that the trial court did not properly place the witnesses under the exclusionary rule by instructing them "not to discuss the case among themselves." *See* Tex. R. Evid. 614; Tex. R. Civ. P. 267. Once "the rule" is invoked, the trial court must exclude witnesses from the courtroom and admonish witnesses "not to converse with each other or with any other person about the case other than the attorneys in the case, except by permission of the court." *Drilex Sys., Inc. v. Flores*, 1 S.W.3d 112, 117 (Tex. 1999).

Hayes must demonstrate on appeal that the trial court erred, and that a violation of the rule occurred. *See id.* Yet, Hayes offers no record citations to support his contention, and the record does not disclose that he brought any violation of the rule to the trial court's attention or asked that a witness be excluded or held in contempt for violating the rule. *See id.* To the contrary, the record establishes that the court conformed to the rule. The witnesses were sworn and instructed to wait in the attorney-ready rooms, and the trial court instructed them to not discuss the case while waiting to be called. Hayes offered no evidence that a violation occurred, and we find none. Accordingly, Hayes has not established that the trial court abused its discretion.

We overrule Hayes's issue (g).

Conclusion

We affirm the judgment of the trial court.

Sherry Radack
Chief Justice

Panel consists of Chief Justice Radack and Justices Alcala and Bland.

Appendix E

CAUSE NO. 2005-43586

LEROY HAYES, JR., PRO SE
Plaintiff,

VS.

WELLS FARGO BANK, N.A.
Defendant.

IN THE DISTRICT COURT
280TH JUDICIAL DISTRICT
HARRIS COUNTY, TEXAS

FINAL JUDGEMENT

On May 8, 2006 this case came on for trial. The Plaintiff appeared in person, pro se, and announced ready for trial. Wells Fargo Bank, N.A. appeared in person through a corporate representative, together with their lawyer, Harry Herzog and announced ready for trial.

No jury having been properly requested, and no jury fee having been timely paid, this case as tried to the Court without a jury. The Court heard argument from both sides, considered all of the oral testimony and written evidence admitted to evidence, and evaluated the evidence in light of the applicable law. The Court has determined that Mr. Hayes should recover nothing on his claims. Wells Fargo should recover on its modified counterclaim to reaffirm the two notes. It is therefore

ORDERED, ADJUDGED, and DECREED that Leroy Hayes, Jr. have and recover nothing of and from Wells Fargo Bank, N.A. It is further

ORDERED, ADJUDGED, and DECREED that Wells Fargo Bank, N.A. have and recover judgment of and from Leroy Hayes, Jr. reaffirming both promissory notes in issue.

1. $34,448.53 principal and interest of the Promissory Note dated August 26, 2004, as of May 8, 2006 is due and owing plus
2. $227,748.88 principal and interest on the Promissory Note dated July 9, 2004 is due and owing, plus
3. reasonable and necessary attorneys fees
4. court costs and postjudgment interest in the amount of 7.5% per year, compounded annually, on all sums awarded in this judgment. It is further

ORDERED, ADJUDGED, and DECREED that Wells Fargo Bank, N.A. have and recover judgment of and from Leroy Hayes, Jr. in the amount of $10,000 if a Notice of Appeal is filed, together with an additional $5,000 if a Petition for Review is filed with the Texas Supreme Court, together with $10,000 if the Texas Supreme Court grants review.

Although Dick Kovacevich was originally named in the style of this case, Mr. Kovacevich is not a Defendant in this case. The Plaintiff's Original Petition and Plaintiff's First Amended Petition do not name Mr. Kovacevich as a party Defendant within the body of the pleadings. The Plaintiff has not designated Mr. Kovacevich as a Defendant in response to the written Request for Disclosure sent by Defendant, Wells Fargo Bank. Therefore, the Court finds that Dick Kovacevich was never a party to this lawsuit.

This is a final judgment, disposing of all claims by and between the Plaintiff, Leroy Hayes, Jr. and the only Defendant, Well Fargo Bank, N.A.

Any relief not expressly granted herein is DENIED. This judgment finally disposes of all claims and all parties, and is appealable.

Signed this the 9th day of May 2006.

_____s/_____
Judge Tony Lindsay

Approved as to form and substance and entry requested:

HERZOG, CARP &McMANUS

By: _____s/_____
Harry Herzog
7500 San Felipe, Suite 675
Houston, TX 77063
Ph: (713) 781-7500
Fax: (713) 781- 4797
ATTORNEY FOR DEFENDANT

Appendix F

PrimeBank
Commercial Fixed Rate Promissory Note

Officer Identification
SMH
Interest Rate
9.000%
Amount Financed
$100,000.00
Funding Date
02/11/2000
Maturity Date
02/11/2005
Customer Number
H602413
Loan Number
10210000311

PAYMENT SCHEDULE: Borrower shall pay the principal and interest according to the following schedule:

On demand, but if no demand is made, then:

59 payments of $1608.91 beginning March 11, 2000 and continuing at monthly time intervals thereafter. A final payment of the unpaid principal balance plus accrued interest is due and payable on February 11, 2005.

On bank draft.

Appendix G

Amortization Table

Full Disclosure

RegZ APR (US Rule)	9.000%
Amount Financed	**$100,000.00**
Finance Charge	$24, 546.20
Total of Payments	$124,546.20

Accrual Method	Actual/Actual Simple
Note Rate	9.000%
60 P+I Payments of	$2075.77

5 previous loans (in the amounts of $260,800, $25,000, $25,000, $35,000 and $10,000) from this same bank and loan officers were obtained under this Regulation Z payment schedule without any complaints from this petitioner.

Appendix H

PRIMEBANK/WELLS FARGO BANK DEFINITION OF RELATED DOCUMENTS:

Related Documents: The words "Related Documents" all promissory notes, credit agreements, loan agreements, environmental agreements, guaranties, security agreements, mortgages, deeds of trust, security deeds, collateral mortgages, and all other instruments and documents, whether now or hereafter existing, executed in connection with the Indebtedness.

Appendix I

CAUSE #2005- 43586

Re: Testimonies of Susan M. Holcomb and John Scroggins lies to the court:

Susan M. Holcomb Lies to the Court:

1. Susan said she only did loan of $35,000.00 or less in February 2000; first lie.
2. I asked her did she do my $100,000 loan? Her answer was "I did not do the loan for you for $100,000.00. (Vol. 2, RR, P17 L1-7).
3. She said that she discussed a balloon loan with me and that is a lie. (Vol. 2, RR, P25 L1-17 & P26 L1-21).
4. She said she did not do the amortization of the $100,000.00 loan and that is a lie. (See contract in appendix).
5. She lied to cover up her mistakes as a rookie loan officer. Motive for lie or perjury,
   (a) cover of rookie mistakes
   (b) keep her from being reprimanded or fired, and
   (c) she knew she did not have the experience but tried anyway for promotion purposes.

John Scroggin's Lies to the Court:

1. John first lied to the court when he said he did the loan for me $100,000.00. (Vol 3, RR, P14, L23 – 25).*
2. He lied again when he said, "He discussed with me a balloon loan" (Vol. 2, RR, P99, L1-11).

3. He lied when he told the court, "He did a 10-year loan paid up in 5 years". (Vol. 3, RR, P14, L23-25 & P15, L1-6, P17, L1-8).
4. He lied about amortization of the $100,000.00 loan since he did not do the loan himself. (Vol. 2, RR, P124, L7-21)
5. He lied to cover up Susan's mistakes to prevent both of them from being fired and he stated that in his office at Wells Fargo Bank.
6. He lied when he said he was not notified by certified mail that he was going to be subpoenaed for court on this matter with Prime Bank.

***John Scroggins was asked earlier, "If he amortized loans whether they were $25K, $100K or $150K personally"? His answer was, "No, I do not". Volume 2, RR, P99 L1 – 11 or specifically L7 – 11.**

Appendix J

Texas Promissory Installment Note (w/Balloon Payment)

RECITATIONS:

Date: _____

Borrower: _____

Borrower's Address: _____

_____

Payee: _____

Place for Payment: _____

_____

Principal Amount: $_____

Term: _____ (months)

Monthly Payments: $_____

INTEREST RATE. Annual interest rate on matured, unpaid amounts shall be the maximum amount permitted by the Laws of the State of Texas.

PAYMENT TERMS. This Note is due and payable as follows, to-wit: _____ (____) *[insert number of payments]* equal monthly payments of $_____ principal *[insert monthly payment amount]*. The first such payment due and payable on the 1st day of _____, 20____, and a like installment shall be due and payable on the same day of each succeeding month thereafter until the total principal of $_____ principal *[insert total principal*

amount] is paid in full. If each payment is not paid on time, the remaining balance will be subject to the maximum amount of interest permitted by the Laws of the State of Texas.

BALLOON PAYMENT. Borrower promises to make a single, final payment for the entire balance owed to the Payee on or before _____ *[due date for balloon payment].*

BORROWER'S PRE-PAYMENT RIGHT. Borrower reserves the right to prepay this Note in whole or in part, prior to maturity, without penalty.

PLACE FOR PAYMENT. Borrower promises to pay to the order of Payee at the place for payment and according to the terms for payment the principal amount plus interest at the rates stated above. All unpaid amounts shall be due by the final scheduled payment date.

DEFAULT AND ACCELERATION CLAUSE. If Borrower defaults in the payment of this Note or in the performance of any obligation, and the default continues after Payee gives Borrower notice of the default and the time within which it must be cured, as may be required by law or written agreement, then Payee may declare the unpaid principal balance and earned interest on this Note immediately due. Borrower and each surety, endorser, and guarantor waive all demands for payment, presentation for payment, notices of intentions to accelerate maturity, notices of acceleration of maturity, protests, and notices of protest, to the extent permitted by law.

INTEREST ON PAST DUE INSTALLMENTS AND CHARGES. All past due installments of principal and/or interest and/or all other past-due incurred charges shall bear interest after maturity at the maximum amount of interest permitted by the Laws of the State of Texas until paid. Failure by Borrower to remit any payment by the 15th day following the date that such payment is due entitles the Payee hereof to declare the entire principal and accrued interest immediately due and payable. Payee's forbearance

in enforcing a right or remedy as set forth herein shall not be deemed a waiver of said right or remedy for a subsequent cause, breach or default of the Borrower's obligations herein.

INTEREST. Interest on this debt evidenced by this Note shall not exceed the maximum amount of non-usurious interest that may be contracted for, taken, reserved, charged, or received under law; any interest in excess of the maximum shall be credited on the principal of the debt or, if that has been paid, refunded. On any acceleration or required or permitted prepayment, any such excess shall be canceled automatically as of the acceleration or prepayment or, if already paid, credited on the principal of the debt or, if the principal of the debt has been paid, refunded. This provision overrides other provisions in this instrument (and any other instruments) concerning this debt.

FORM OF PAYMENT. Any check, draft, Money Order, or other instrument given in payment of all or any portion hereof may be accepted by the holder and handled in collection in the customary manner, but the same shall not constitute payment hereunder or diminish any rights of the holder hereof except to the extent that actual cash proceeds of such instruments are unconditionally received by the payee and applied to this indebtedness in the manner elsewhere herein provided.

ATTORNEY'S FEES. If this Note is given to an attorney for collection or enforcement, or if suit is brought for collection or enforcement, or if it is collected or enforced through probate, bankruptcy, or other judicial proceeding, then Borrower shall pay Payee all costs of collection and enforcement, including reasonable attorney's fees and court costs in addition to other amounts due.

SEVERABILITY. If any provision of this Note or the application thereof shall, for any reason and to any extent, be invalid or unenforceable, neither the remainder of this Note nor the application of the provision to other persons, entities or circumstances shall be affected thereby, but

instead shall be enforced to the maximum extent permitted by law.

BINDING EFFECT. The covenants, obligations and conditions herein contained shall be binding on and inure to the benefit of the heirs, legal representatives, and assigns of the parties hereto.

DESCRIPTIVE HEADINGS. The descriptive headings used herein are for convenience of reference only and they are not intended to have any effect whatsoever in determining the rights or obligations under this Note.

CONSTRUCTION. The pronouns used herein shall include, where appropriate, either gender or both, singular and plural.

GOVERNING LAW. This Note shall be governed, construed and interpreted by, through and under the Laws of the State of Texas.

Borrower is responsible for all obligations represented by this Note.

EXECUTED this _____ day of _____ _____, 20_____.

[Borrower's Signature:]

_____

[Borrower's Printed or Typed Name]:

_____

Appendix K

Wells Fargo Bank
Loans and Lines Comparison Chart

#1	#2	#3
Wells Fargo BusinessLoan®	**Equipment Express®**	**Business Real Estate Financing**
Established businesses who need a lump sum cash distribution to seize business opportunities or to expand and grow their business	Established businesses who are in need of financing for equipment or vehicles	Established business owners who want to refinance or tap the equity in their business or investment property[1]
$10,000 – $100,000	$10,000 – $100,000	$50,000 – $500,000 (up to 75% of the property value)
None	Your purchased equipment or vehicle	Business or investment property valued up to $3 million[2] (No second homes)
Fixed rates based on the term length and your credit history	Fixed rates determined each time you make a purchase	• Loan: Fixed or adjustable • Line of credit: Prime + 1.25% to Prime + 5.25%

Column 1 – Wells Fargo Business Loan: A fixed interest rate loan with a fixed monthly payment for the term of the

loan (60 months/5 years in petitioner's case): The applicable guideline.

Column 2 – For equipment or vehicle financing – not applicable.

Column 3 – Business Real Estate where balloon notes are-not applicable.

https://www.wellsfargo.com/biz/products/credit/loans_lines/chart

Appendix L

JUSTICE INFORMATION MANAGEMENT SYSTEM
CIVIL CASE INTAKE
CASE SUMMARY INQUIRY

CASE NUMBER: 200543586
STYLE: HAYES, LEROY JR.
JURY FEE PAID DATE: 07112005

FILED
CHARLES BACARISSE
DISTRICT CLERK
HARRIS COUNTY, TEXAS
2006 MAY – 9 PM 12:16

Appendix M

LETTER TO JUDGE ELIZABETH RAY

CASE #2005-43586

RE: LEROY HAYES, JR.
v.
WELLS FARGO BANK

Judge Elizabeth Ray,

I have been unable to work with Attorney Harry Herzog (the lawyer Wells Fargo retained) because he is not giving me the info I am requesting with the law of the state of Texas. He would like to receive every item he is requesting from me, so I am and should expect the same from him.

We are at a stand still, hence, your intervention may be needed.

Regretfully,

_____s/_____

Leroy Hayes, Jr.

Phone # (713) 781-7500

1/11/06

Filed
Charles Bacarisse
District Clerk
February 20, 2006
Harris County, Texas
By _____s/_____
Deputy

CASE #2005-43586

LEROY HAYES, JR., PRO SE

Plaintiff,

v.

WELLS FARGO BANK, N.A.

Defendant.

Attn: Harry Herzog, Attorney at Law.

Re: Disclosures

I need from your firm the rep for Wells Fargo in regard to the above case and any witnesses to be a part of the same.

Thanks,
Leroy Hayes, Jr.

Faxed on 3/06 to Attorney Harry Herzog, Wells Fargo Bank Attorney.

Mistrial Materials

HAYES' FAX ACTIVITY REPORT

March 27, 2006

A one-page request to Harry Herzog, Attorney at Law, for Respondent Wells Fargo Bank requesting any and all evidentiary disclosures for the upcoming civil trial.

Receiving Fax Number: 713-781-4797
Owned by Harry Herzog
From
Fax Number: 713-643-1864

Number of Pages Transmitted: 2
Number of Pages Shown Received: 2

Appendix N

THE JUDGE'S NON-EXISTENT IMPARTIALITY

From Vol. 3 of 3, RR, P. 169-171

This is a brief portion of Judge Tony Lindsay's statement to the court:

I do not believe that either Mr. Scroggins or Miss – I'm sorry – that Ms. Holcomb lied to the Court. I do believe that they testified from what they believed occurred and what should have occurred, but I don't think they really remember it all that well. I think they both testified as to the number of loans that they do every year and I believe Mr. Scroggins, in particular, mentioned that did he a lot of loans. He didn't necessarily remember them all and I think that – that they may not specifically remember what they told to Mr. Hayes and , therefore, I find, as I said a minute ago, that they did not adequately impress upon Mr. Hayes the amount of the balloon payment at the end...

These are the kinds of excuses that the judge gave for both Susan Holcomb and John Scroggins for inconsistent testimony and lies that can be substantiated within Appendix I.